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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 374

WORLD COMMERCE CORPORATION, S.A.,
Petitioner,

v.

MINERALS AND CHEMICALS PHILIPP CORP.,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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No.

WORLD COMMERCE CORPORATION, S.A.,
Petitioner,

v.

MINERALS AND CHEMICALS PHILIPP CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, World Commerce Corporation, S.A., prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New York, Appellate Division, First Department, entered in the above-entitled case on February 27, 1962, further review of which in the State Courts was finally denied to petitioner on September 20, 1962.

Citations to Opinions Below

The opinion of the Supreme Court of the State of New York, Appellate Division, First Department, on the judgment for which review is sought is reported at 15 App.

Div. 2d 432, 224 N. Y. S. 2d 763, and is printed in Appendix A, pp. A3-A6.

The order dismissing an appeal taken as of right to the Court of Appeals of the State of New York is reported at 11 N. Y. 2d 1109, 184 N. E. 2d 319, and is printed in Appendix A, pp. A7-A8.

The order resettling the latter order, and holding that any denial of World Commerce's Constitutional rights is not appealable until after the arbitration proceeding is determined on the merits, is not reported. It is printed in Appendix A, pp. A9-A10.

The order of the Appellate Division denying petitioner's motion for leave to appeal to the Court of Appeals is not reported. It is printed in Appendix A, pp. A11-A12.

Jurisdiction

The jurisdiction of this court is invoked under Title 28 USC §1257(3) on the ground that petitioner has claimed a right guaranteed by the Constitution of the United States in the courts of the State of New York.

On September 20, 1962 the Supreme Court of the State of New York, Appellate Division, First Department entered an order finally and completely terminating petitioner's timely attempts to obtain state review of an earlier order and judgment involving petitioner's constitutional rights. That earlier order and judgment, which petitioner now seeks to review, was entered in the Appellate Division, First Department on February 27, 1962.

Questions Presented

Are the "unreasonable search," "due process" and "equal protection" clauses of the Fourth and Fourteenth Amendments to the United States Constitution violated

by an order of a state court sustaining the ultimate legal enforceability of a subpoena *duces tecum*, that would require a disinterested third person to publish and make available for inspection by his competitors valuable trade secrets in the course of a private arbitration proceeding between his competitors.

1. Where the question submitted for arbitration is not required to be justiciable?

2. Where the arbitrators, privately selected by the witness' competitors, are empowered to answer the arbitrated question pursuant to their personal whims and standards without reference to any generally applicable body of public substantive or adjectival law?

3. Prior to the introduction of any evidence or testimony as to the relevance or necessity of the subpoenaed records to any alleged "issue" in the arbitration?

4. Without permitting any judicial review with respect to the propriety of the subpoena or the relevance, materiality and necessity of the trade secrets to any purported issue before the arbitrators?

5. When the state courts do not require such publication and inspection pursuant to similar subpoenas *duces tecum* issued in actions or proceedings other than arbitration proceedings?

Statutes Involved

The statutory provisions involved are sections 406, 1448 and 1456 of the New York Civil Practice Act. They are reproduced in Appendix B, *infra*, pp. B1-B5.

STATEMENT OF THE CASE

The Parties

Panamerican Commodities, S.A., is a Peruvian corporation engaged in the mining of iron ore in Acari, Peru (R. 123).[1] Minerals and Chemicals Philipp Corporation is a Maryland corporation whose business is, among other things, the marketing of ore taken from mines in the Western Hemisphere (R. 122-123). The petitioner, World Commerce Corporation, S.A., is a Panamanian corporation similarly engaged in marketing ore taken from mines in the Western Hemisphere and is a principal competitor of Minerals and Chemicals Philipp Corporation (R. 55-56, 99, 142), as well as of Panamerican Commodities, S.A. (R. 187). (The parties are hereafter referred to as "Panamerican," "Philipp" and "World Commerce," respectively.)

The Arbitration Proceeding

Philipp and Panamerican agreed to submit to arbitration any disputes arising from an agency contract allegedly concluded by them in 1959, pursuant to which Philipp agreed to act as Panamerican's *non-exclusive* agent in the sale of ore taken from the Acari mine (R. 286-291). An arbitration proceeding was commenced between these parties on November 20, 1959 when Philipp filed its Demand for Arbitration with the American Arbitration Association alleging that Panamerican had breached the agreement by terminating Philipp's agency (R. 24).

Philipp requested that the arbitrators meet for the first time on September 29, 1961 (R. 33-34). The sole purpose

1. References are to folios in the printed "Papers on Appeal From Order" in the Court of Appeals of the State of New York, nine copies of which have been filed with this Court.

of the requested meeting was to secure the issuance of a subpoena *duces tecum* (R. 120-122) directing World Commerce to produce *all* its documents relating to transactions or dealings in iron ore mined at Acari, Peru "made, entered into or consummated with persons, firms and corporations in the Western Hemisphere" during a period of more than one year (R. 58-63). The subpoena *duces tecum* issued from the arbitrators although no evidence or testimony has ever been taken in the proceeding, regarding either the matter in controversy between the parties or the relevance of the subpoenaed documents to the resolution of that controversy (R. 37-39).

The only apparent ground for the issuance of the subpoena was the unsworn opening statement of Philipp's counsel before the arbitrators (R. 122-159). That statement, however, indicates no more than the documents may become relevant to the calculation of damages if Philipp eventually succeeds in making out its claim against Panamerican. Moreover, counsel stated that Philipp had been designated *exclusive* agent[2] for the sale of ore produced by Panamerican at its Acari mine (R. 128-129) and that, since he "believed" some ore from the Acari mine passed through petitioner's hands without the intervention of Philipp, petitioner's records were a proper subject of inquiry (R. 153-156). Although the allegation of exclusive agency was unsworn and conflicts with the terms of the agreement under which the arbitration was commenced (R. 287), it was accepted by the arbitrators and formed a basis for the issuance of the subpoena.

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2. The significance of counsel's unsworn reference to exclusive agency appears in the language of the Appellate Division's opinion, p. 7, *infra*; Appendix A, pp. A3, A5.

The Litigation

World Commerce moved to quash the subpoena in the Supreme Court of the State of New York, Special Term, New York County, on the ground that Philipp had presented no evidence that the documents sought were relevant or material to the controversy (R. 16-78). Justice Amsterdam denied the motion, stating that "The minutes of the hearing disclose that the production of the books and records are material and necessary" (R. 13-15).

World Commerce was not present at the hearing before the arbitrator (R. 117). It had no part in compiling the "record" or minutes to which Justice Amsterdam referred in the rendition of an order which removed any safeguards that may have been implicit in the statutory sections involved (N. Y. Civil Practice Act §§406, 1456; Appendix B, pp. B1-B3, B5).

When petitioner took its appeal to the Appellate Division of the Supreme Court for the First Department, it contended that in the total absence of any evidence of materiality there was no showing of a "proper case", as required by §406 of the N. Y. Civil Practice Act (Appendix B, p. B1), and that Justice Amsterdam's order therefore amounted to an authorization of unreasonable search and seizure and a taking of property without due process of law in contravention of the Fourth and Fourteenth Amendments to the United States Constitution (Appendix C, p. C3).

The Appellate Division modified Justice Amsterdam's order by providing that World Commerce might, if so advised, seek the appointment of a referee "to supervise the production and inspection of documents" before the arbitrators (R. 444, 456; Appendix A, pp. A2, A6). Thus

modified, and without comment on the constitutional issues; the Appellate Division affirmed the order below, stating that "It was sufficient that * * * [Minerals Corp.] *show* * * * that the documents will reflect any alleged sales made without the intervention of Minerals Corp. as *exclusive* agent[3] and will establish the extent of such sales. *Their relevancy to* both *the alleged breach* and any damages *is therefore clear*" (Emphasis added) (R. 453; Appendix A; p. A5).

Petitioner next sought hearing of its constitutional arguments in the Court of Appeals of the State of New York, contending that the Appellate Division's order aggravated rather than ameliorated the denial of petitioner's rights under the Fourth and Fourteenth Amendments, and that the Appellate Division's referral of "supervisory" functions with respect to "inspection" of the documents to a referee without providing for judicial review of the referee's decisions created a new and different denial of petitioner's rights guaranteed by the Fourteenth Amendment (Appendix C, p. C4). On Philipp's motion the appeal was dismissed "on the ground that the order sought to be appealed from does not finally determine the proceeding within the meaning of the Constitution [of the State of New York]" (Appendix A, p. A8). On petitioner's motion to resettle this order, the Court of Appeals stated that it regarded the order below as one made in conduct of the arbitration itself and, as such, not appealable until after resolution of the entire arbitration proceeding on the merits as between Panamerican and Philipp (Appendix A, pp. A9-A10).

3. This characterization can only be the result of the unsworn allegations of Philipp's counsel, and it conflicts with the terms of the agreement providing for the arbitration proceeding (R. 287).

Petitioner then moved in the Appellate Division for leave to appeal to the Court of Appeals (Appendix C, p. C1). That motion was denied as well (Appendix A, pp. A11-A12). Thus, the New York courts have made it abundantly clear that they will not determine whether the subpoena violates World Commerce's constitutional rights until long after the subpoena has been obeyed and World Commerce's property in its trade secrets has been destroyed.

The Decision Below Is a Final Decision Reviewable in This Court

Although the New York Court of Appeals has characterized the order below as non-final within the meaning of the New York Constitution, it is a final order within the meaning of Title 28 U. S. C. §1257(3).

The judgment of the Appellate Division is final in that it is subject to no further review in any other state tribunal before such time as the federal constitutional questions tendered would become moot. Further, it is a complete and effective termination of the litigation commenced by petitioner to quash the subpoena, *Market Street Ry. Co.* v. *Railroad Commission*, 324 U. S. 548 (1944), and, as such, is a final decision for purposes of federal review. *O'Connor* v. *O'Connell*, 253 F. 2d 365 (1st Cir. 1958).

The Appellate Division Is the Highest Court of the State of New York in Which a Decision in This Case Can Be Had

This petition for a writ of certiorari is properly addressed to the Supreme Court of the State of New York, Appellate Division, First Department.

The New York Civil Practice Act (§588) provides that appeal to the Court of Appeals may be taken as of right only from a final order. By characterizing the Appellate Division's order affirming Special Term's order denying the motion to quash the subpoena as non-final under New York law, the Court of Appeals left as the only source of state review appeal by permission of the Appellate Division (N. Y. Civil Practice Act §589, 592). The Appellate Division has refused to grant permission for review by the New York Court of Appeals (Appendix A, p. A11), and thus becomes the highest court in the state in which a decision in this case can be had. *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157, 160 (1954); *American Ry. Express Co. v. Levee*, 263 U. S. 19, 20-21 (1923); *Sullivan v. Texas*, 207 U. S. 416, 422 (1907).

Presentation of the Federal Question Below

Although the constitutional issues raised in this petition were presented for the first time in the Appellate Division, they did not arise until Special Term denied World Commerce's motion to quash the subpoena, for this was the first approval by the state of an unreasonable search into World Commerce's papers and of a deprivation of World Commerce's "trade secret" property without due process of law. Petitioner presented these constitutional objections directly to the Appellate Division, thus raising them at the first possible instance. *Herndon v. Georgia*, 295 U. S. 441, 443-444 (1935).

It should be noted further that failure to raise a constitutional issue in the trial court does not preclude later consideration of such issues by higher New York courts. *Jongebloed v. Erie R. R. Co.*, 296 N. Y. 912, 75 N.E. 2d 273 (1947) (constitutional question raised in Appellate

Division); *Matter of Hood & Sons* v. *DuMond*, 297 N. Y. 209, 213, 78 N.E. 2d 476 (1948), and therefore does not preclude consideration in this Court.

The above described constitutional questions have been argued and relied upon in every stage of the proceedings taken after the decision of the trial court (Appendix C, pp. C1-C8).

The Decision Below Was Not Based on "Adequate" Non-Federal Grounds

The courts below have based their refusal to review petitioner's constitutional arguments, though seasonably raised, on the ground that the order for production of documents is a non-final order within the meaning of the New York State Constitution.

This basis of decision, rather than constituting an "adequate non-federal ground" which would preclude further review by this Court, amounts to a complete evasion of the state courts' duty to hear and decide petitioner's contentions. Federal rights are denied as well by failure to hear as by erroneous decision. *Lawrence* v. *State Tax Commission of Mississippi*, 286 U. S. 276, 282 (1932). In this case petitioner's rights can be protected only by action taken presently, and the New York courts, under the guise of the rules of local practice, have refused petitioner any protection. That type of evasion has previously been condemned by this Court:

> "[T]he assertion of federal rights when plainly and reasonably made, is not to be defeated under the name of local practice." *Angel* v. *Bullington*, 330 U. S. 183, 188 (1947); *Davis* v. *Wechsler*, 263 U. S. 22, 24 (1923).

Moreover, even if procedurally sound under state law, the ground of the decisions below is "plainly untenable" and should not be allowed to prevent review by this Court. *Ward* v. *Board of County Commissioners of Love County, Oklahoma*, 253 U. S. 17, 22 (1920). The proffered grounds completely deny petitioner's right to ever have its constitutional arguments heard. If they are not heard now, it appears that petitioner must produce the records under subpoena and permit them to be "inspected" by the arbitrators and petitioner's business competitors under the non-reviewable "supervision" of a referee. Once the records are produced, the constitutional contentions will become moot and petitioner will have lost any ground for review. *St. Pierre* v. *United States*, 319 U. S. 41, 42-43 (1943); *Cheong Ah Moy* v. *United States*, 113 U. S. 216 (1885).

THE WRIT SHOULD BE GRANTED

Summary of Argument

This Court is no stranger to arbitration proceedings. The rapidly growing importance of this extra-legal method of resolving disputes between private parties is perhaps best illustrated by the increasing number of decisions in which the Court is gradually pricking out the rights and duties of the parties to an arbitration, and the powers of the arbitrators. Never before, however, has this Court considered the extent to which parties to an arbitration, by surrendering their own legal rights either genuinely or collusively, can thereby deprive a non-party competitor of his fundamental rights and invade his business and privacy by way of summary routes that would be closed to them in a traditional court of law.

While arbitrating parties should be left free to contract for any type of adjudication they want, arbitration should not be allowed to become an unbridled monster with a license to trample upon third parties while courts look the other way. This case demonstrates that, at least in New York, the Constitution will not be permitted to accompany a witness into the arbitration chamber unless this Court reaffirms the Constitution's supremacy over informal arbitration tribunals created by private contract.

Distinct and explicit guarantees against the unreasonable search of private papers, the taking of property without due process of law, and the denial of the equal protection of the laws, are prominent features of the United States Constitution (U. S. Const. amend. IV, XIV). The Fourteenth Amendment is by its very terms a limitation on state action. The Fourth Amendment also limits state action because a violation of the Fourth Amendment sanctioned by state authority violates the Fourteenth Amendment. *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Monroe* v. *Pape*, 365 U. S. 167 (1960); *Stefanelli* v. *Minard*, 342 U. S. 117 (1951).

In the present case the New York courts have sanctioned violation of all three provisions by acting in a pro forma way to require compliance with a subpoena *duces tecum* which does not meet the minimal requirements necessary to qualify it as constitutionally valid, and to require compliance in a manner that results in more complete loss of the property exposed by the subpoena than the New York courts permit in other kinds of actions or proceedings. Compliance with the subpoena, the propriety of which has not been judicially determined, will result in disclosure and coincidental loss of trade secrets which

have the status of property under New York law, and which are extremely valuable to petitioner. Unless this Court now hears petitioner's arguments, this unreasonable search will result in permanent loss of its property and petitioner will have no ground on which to raise grave constitutional questions.

The Decisions Below Authorize an Unreasonable Search in Violation of the Fourth and Fourteenth Amendments to the United States Constitution.

Every subpoena *duces tecum* and every judicial order requiring the production of corporate records must satisfy the tests of constitutionality before obedience to it can be demanded. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186 (1946). There, this Court characterized a judicial order requiring the production of corporate books and records a "constructive" search which, if unreasonable, violates the guarantees contained in the Fourth Amendment (327 U. S. at 208).

The reasonableness of the judicial order for the production of documents is the determinant of its constitutional validity. To meet the test of reasonableness spelled out in *Oklahoma Press Publishing Co.* v. *Walling*, *supra*, an order for production (1) may not be too broad in scope and (2) must be one that the demanding agency is authorized to make; and, (3) *the materials specified must be relevant to the matter under inquiry* (327 U. S. at 208).

These requirements are neither minor nor ministerial (327 U. S. at 217, n. 57). They are a condition precedent to the validity of the order and must be shown by evidence. This principle was articulated long ago in the leading case

of *Hale* v. *Henkel*, 201 U. S. 43 (1906), where it was said of the subpoenaed documents that "some *evidence* of their materiality [must be] produced" to lay a constitutionally sound foundation for the issuance of the subpoena *duces tecum* (Emphasis added) (201 U. S. at 77).

Since *Hale* the courts have consistently and repeatedly stressed that it is essential for the party seeking production to demonstrate the relevance and materiality of each document he seeks before any court has the power to order their production in the face of constitutional objection. The requirement is that, to avoid unreasonable search in violation of a witness' constitutional right to privacy, "* * * there must be relevancy to the subject of investigation." *Fleming* v. *Montgomery Ward & Co., Inc.*, 114 F. 2d 384 (7th Cir. 1940), *cert. den.*, 311 U. S. 690 (1940). "All the cases emphasize that only production of documents relevant to the inquiry may be compelled." *U. S.* v. *International Nickel Company of Canada, Ltd.*, 203 F. Supp. 739 (S. D. N. Y. 1962).

It is now clear that failure to demonstrate relevance is alone sufficient to invalidate a subpoena even if it embraces only a few papers:

> "The question is whether the books and records of the Bank sought by the subpoena called for matter relevant and pertinent to the inquiry * * * The test of validity of the subpoena [under the Fourth Amendment] is not the extent of the books and records called for but whether those called for are pertinent and relevant to the inquiry." *McGarry* v. *S.E.C.*, 147 F. 2d 389, 392 (10th Cir. 1945)

In short, in order for a court to enforce a subpoena *duces tecum*, the "record" before it must contain *evidence* upon which the court can base findings that resolution of the

basic controversy depends upon resolution of a particular issue, that the items sought are relevant and material to the resolution of that issue, and that the documents sought contain such items.

> "Obviously irrelevant documents may not be required to enable the demanding agency to determine what is relevant * * *.
>
> 'The analogies of the law do not allow the party wanting evidence to call for documents in order to see if they do contain it.'" *United States* v. *International Nickel Co. of Canada, supra*, 203 F. Supp. at 743.

In the present case, without any evidence of relevance, an arbitration board has issued its subpoena requiring the production of petitioner's business records (R. 58-63). Its conclusion as to materiality has been accepted without question by the New York courts (R.15) even though the conclusion, on its face, is contradicted by the express language of the agreement under which the arbitration board was impaneled (see pp. 4 to 7, *supra*). This blanket acceptance has removed all constitutional safeguards surrounding the arbitrators' authority to compel disinterested third persons to disclose the contents of their private papers. Nothing could so completely infringe the people's right to be "secure in their * * * papers and effects." (U. S. Const., amend. IV).

Prior to the decision below, some New York courts had guarded against infringement of the Fourth Amendment guarantees by requiring compliance with an arbitrator's subpoena *duces tecum* only after presentation of evidence that the materials sought were relevant to the disposition of the controversy. *Application of Sun-Ray Cloak Co., Inc.*, 256 App. Div. 620, 11 N. Y. S. 2d 202 (1st Dept. 1939)

(subpoena quashed where record did not contain sufficient *evidence* of relevance). See also, *Matter of Re-Anne Mfg. Corp.*, 1 Misc. 2d 717, 149 N. Y. S. 2d 161 (Sup. Ct. 1955). By abdicating that position, they have now given the privately appointed arbitrator freedom to proceed as he wishes.

The statute which authorizes his activity, as now interpreted by the New York courts, places no limit upon it. He is authorized to require the production of documents in a "proper case" (N. Y. Civil Practice Act §406), and for all practical purposes may now determine for himself what is a proper case without regard to any legislative or judicial standards. Further, in New York any "controversy" or "question" can be submitted to arbitration, setting in motion all the machinery of the Arbitration Law (N. Y. Civil Practice Act, §§1448-1469), including this unlimited subpoena power, "without regard to the justiciable character" of the "question" or "controversy." Section 1448, N. Y. Civil Practice Act; Legis. Doc. (1959) No. 65 (E), *McKinney's Session Laws of New York 1959*, p. 1599. Thus, the arbitrator's command may issue and the courts will enforce it though there be no dispute between the arbitrating parties that public law recognizes as warranting resolution.

Moreover, in resolving the question or controversy before them, whether or not it is justiciable, the arbitrators are not required to follow or even refer to any body of public substantive or adjectival law; their decision must be enforced by the courts, whether or not it is based upon a misinterpretation, or even a total ignorance, of whatever law, if any, might apply were the question a justiciable one being decided by a duly constituted court of law. Section 1462, N. Y. Civil Practice Act; *Masury* v. *Whiton*, 111 N. Y. 679, 18 N. E. 638 (1888); *Perkins* v. *Giles*, 50

N. Y. 228 (1872); *Matter of Brighton Mills, Inc.*, 282 App. Div. 669, 122 N. Y. S. 2d 113 (1st Dept. 1953); *Matter of Wheat Export Co., Inc.*, 185 App. Div. 723, 173 N. Y. S. 679 (1st Dept. 1919), *aff'd*, 227 N. Y. 595, 125 N. E. 912 (1919); *Matter of Great Atlantic & Pacific Tea Co.*, 23 Misc. 2d 1069, 202 N. Y. S. 2d 373 (Sup. Ct. 1960). This siphons all meaning out of the statutory "proper case" test, for when there are no rules pursuant to which the arbitrators' decision must be made, it is impossible to determine what "issues" the arbitrators think they ought to resolve and equally impossible to decide whether particular documents may be relevant to those "issues".

The Decisions Below Authorize a Taking of Petitioner's Property Without Due Process of Law

In the present case, compliance with the subpoena will result in a taking of valuable property without judicial hearing and so violate the constitutional prohibition against a taking of property without due process of law. Compliance will publish to petitioner's competitors the very terms and conditions on which it deals with its customers. These private arrangements are the substance of petitioner's business relations. Under New York law, they constitute valuable property which petitioner owns. *Haffenberg v. Wendling*, 271 App. Div. 1057, 569 N. Y. S. 2d 546 (4th Dept. 1947); cf. *Drake v. Herrman*, 261 N. Y. 414, 185 N. E. 685 (1933). Yet, they may now be taken and disclosed to its competitors.[4]

4. Petitioner does not contend that these records are immune from disclosure when the public interest is involved, either because a government agency seeks them or because they are sought by a private party to a controversy being adjudicated by a constitutional, statutory or common law court of general jurisdiction. It recognizes that

without the slightest pretext of due process. Petitioner has yet had no effective means or opportunity to obtain a judicial hearing on its constitutional objections.

The purported judicial review of the propriety of the subpoena is completely illusory, because the New York courts have demonstrated that they will accept at face value the conclusions which the arbitrators reach. Further, the arbitrators' initial freedom to ignore any evidentiary showing of relevance deprives the court of any standard against which to test the alleged materiality of any subpoenaed documents. It can be no answer to the constitutional objection that the New York courts have in this case allowed petitioner to seek the appointment of a referee before turning its documents over to the arbitrator. This contemplates no more protection than did the arbitrators' original order.

The effect of seeking the appointment of a referee would be a tacit admission that the documents are relevant, contrary to petitioners' sworn and repeated contentions, and would leave it without any ground on which it might thereafter seek to prevent disclosure of its trade secrets.

Other provisions of the order further aggravate, rather than aid, petitioner's position. While recognizing a right to *judicial* determination (R. 451), the court offered petitioner the alternative of waiving any determination at all, or vesting in a referee absolute discretion to determine the relevance of individual documents *in*

"there has always been a real problem of balancing the public interest against private security." *Oklahoma Press Publishing Company* v. *Walling*, 327 U.S. 186, 203 (1946). But no such problem is here present. The only interest against which petitioner's security can be balanced is the interest of private individuals in employing private arbitration as an agency through which they may discover the private business arrangements of petitioner.

cooperation with the parties or the arbitrators; the court itself set no criteria for determining relevance, nor did it provide for any judicial review of the referee's or arbitrators' decision with respect thereto (R. 443-444, 456).

Moreover, the Appellate Division's order contemplates that petitioner's documents should be *inspected* at the outset (R. 444, 456). Inspection of documents is not authorized in New York under a proper and uncontested subpoena *duces tecum* in special proceedings other than arbitration proceedings. *Franklin* v. *Judson*, 99 App. Div. 323, 91 N. Y. S. 100 (1st Dept. 1904); *Franklin* v. *Judson*, 96 App. Div. 607 (1st Dept. 1904). The statute pursuant to which the subpoena was issued does not authorize discovery and inspection of anything; it merely requires the witness "to bring with him a book or paper." N. Y. Civil Practice Act §406; see Hagan, "Impounding and the Subpoena Duces Tecum," 26 *Brooklyn L. Rev.* 199, 212 (1960).

Finally, the fact that the unprecedented inspection is to be conducted "*in cooperation either with the parties* or with the arbitrators" (R. 456) makes the referee completely valueless as a constitutional safeguard. Once the contents of the documents are disclosed to the parties, competitors of petitioner, the substance of the property right will be forever lost without the intervention of any judicial consideration of relevance which is the essence of due process in this context.

The Constitutional Issues Raised Are Not Unique With Petitioner and Can Be Resolved Only By This Court

Clearly the situation created by the decision below is one of great consequence to any person within the reach of the New York Arbitration Law—and the decision below

would bring within the reach of that Law every person, natural or corporate, at whom one of the parties cares to point a finger. Petitioner has no interest in the arbitration, yet its rights are equated to those of the parties to the arbitration agreement. And they are so equated even though the parties to the arbitration have effectively given up their own constitutional rights. They have agreed to be bound by the decision of an arbitrator who can proceed without giving heed to such elementary requirements of due process as consideration based on sworn testimony or legally competent evidence, and who has so proceeded in this case.

They can have no complaint if, after they have given up those protections, the courts will not give them redress. Not so with the petitioner. It is not a party to the arbitration agreement, and it has given up none of the guarantees included in the Constitution.

Petitioner's constitutional rights are threatened only because jurisdiction over it has been created by the agreement of private parties. The failure of the New York courts to thereafter maintain any safeguards for petitioner suggests graphically that the whole New York Arbitration Law must be modified to include in its terms protection of the rights here threatened. But such protection, like that to which the New York courts say petitioner may be entitled after the threatened infringement of its rights has been fully accomplished, will not now aid petitioner in preserving its trade secrets from the subpoena procured by its competitor; nor will it aid any other person whose rights are presently threatened if the decision below is allowed to stand. The inescapable conclusion is that petitioner has no means of vindicating rights guaranteed by the Constitution outside this Court.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

December 19, 1962.

Respectfully submitted,

A. Vernon Carnahan
Attorney for Petitioner

James M. Ellis
Donovan Leisure Newton & Irvine
Of Counsel

APPENDIX A

Remittitur to the Supreme Court of the State of New York, New York County

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 27th day of February, 1962.

Present—Hon. BERNARD BOTEIN, Presiding Justice
" CHARLES D. BREITEL,
" FRANCIS L. VALENTE,
" JAMES B. M. McNALLY,
" SAMUEL W. EAGER, Justices

4446

In the Matter of the Arbitration Between

MINERALS AND CHEMICALS PHILIPP CORP.,
Petitioner-Respondent.

and

PANAMERICAN COMMODITIES, S.A.,
Respondent.

WORLD COMMERCE CORPORATION, S.A.,
Petitioner-Appellant,

vs.

MINERALS AND CHEMICALS PHILIPP CORP.,
Respondent-Respondent.

An appeal having been taken to this Court by the petitioner-appellant from an order of the Supreme Court,

New York County, entered on the 30th day of October, 1961, denying its motion to quash the subpoena *duces tecum*, and said appeal having been argued by Mr. A. Vernon Carnahan, of counsel for the appellant, and by Mr. James H. Halpin, of counsel for the respondent-respondent; and due deliberation having been had thereon and upon the Opinion Per Curiam,

It is unanimously ordered that the order so appealed from be and the same is hereby modified, on the law and in the exercise of discretion, to the extent of remanding the proceeding to Special Term to consider an application by appellant, if it is so advised, for the designation of a referee to supervise the production and inspection of documents described in the subpoena to the end that confidential data be not unnecessarily disclosed, and, as so modified, the order is affirmed, with $20 costs and disbursements to the appellant.

Enter:

VINCENT A. MASSI
Clerk

Appendix A

Opinion of the Appellate Division, First Department of the Supreme Court of the State of New York

In the Matter of the Arbitration between MINERALS AND CHEMICALS PHILIPP CORP., Petitioner-Respondent, and PANAMERICAN COMMODITIES, S.A., Respondent.

WORLD COMMERCE CORPORATION, S.A., Petitioner-Appellant, v. MINERALS AND CHEMICALS PHILIPP CORP., Respondent-Respondent.

Supreme Court, Appellate Division, First Department. Feb. 27, 1962.

Before BOTEIN, P. J., and BREITEL, VALENTE, MCNALLY, and EAGER, JJ.

PER CURIAM.

This appeal concerns the conditions under which an arbitration tribunal may, under sections 406 and 1456 of the Civil Practice Act, issue and enforce a subpoena *duces tecum* directed to one who is not a party to the arbitration.

Respondent Minerals and Chemicals Philipp Corp. began the arbitration under an allegedly exclusive agency agreement with Panamerican Commodities, S.A. for the sale of Peruvian iron ore. Minerals Corp. claims that Panamerican breached the agreement by terminating the agency and substituting appellant World Commerce Corporation, S.A., as its exclusive agent. At the first hearing, Minerals Corp. sought and obtained, from the arbitrators, issuance of a subpoena *duces tecum* addressed to World Commerce, requiring it to produce all books and records relating to its sales, during a specified period, of iron ore obtained from Panamerican. The arbitrators, before issuing the subpoena, heard statements by both parties concerning the relevancy and materiality of the

books and records. World Commerce was not a party to the hearing and did not attend.

Thereafter, upon receiving the subpoena, World Commerce moved at Special Term to quash the subpoena on the grounds that the books and records sought were not relevant or material to the arbitration and, in any event, contained confidential information relating to customers and the details of their purchases which was entitled to protection as a trade secret.

Special Term denied the motion, stating that whether the information is confidential is a matter for determination by the arbitrators, who will make their decision after examining the records.

The order of Special Term should be modified to insure proper protection against unwarranted disclosure of confidential data, and otherwise affirmed.

Although World Commerce is alleged to be closely related to Panamerican, no claim is made that the relationship is so close as to make World Commerce, in effect, a party to the arbitration. Not having consented to be bound by the procedures of this private forum, nor having taken part in its hearings, World Commerce is entitled, in the first instance, to a judicial determination of the propriety of the subpoena.

It is not disputed that the arbitrators have the power to summon witnesses, and in a "proper case", to require production of books and records (Civ. Pract. Act, §§406, 1456). What is a "proper case" is dependent upon the relevancy and materiality of the documents sought and also upon the purpose and necessity for the production (Matter of Hirshfield v. Craig, 239 N. Y. 98, 118, 145 N.E. 816, 822; Matter of Sun-Ray Cloak Co., Inc., 256 App. Div. 620, 624-625, 11 N. Y. S. 2d 202, 206-207).

Minerals Corp., at the hearing before the arbitrators and in its papers in opposition to the motion, sufficiently developed the relevancy of the class of documents sought and the near impossibility of obtaining the information by other means. In so doing, it was not essential that it establish the merits of its claim by proof presented to the arbitrators. It was sufficient that the opposition papers show, and World Commerce does not substantially dispute the fact, that the documents will reflect any alleged sales made without the intervention of Minerals Corp. as exclusive agent and will establish the extent of such sales. Their relevancy to both the alleged breach and any damages is therefore clear.

But whether particular documents called for may be of a confidential and privileged nature has not been determined, and on this question appellant is entitled to a judicial determination without advance disclosure to the arbitrators. Confidential customer list and sales data may, under some circumstances, constitute trade secrets and be subject to limited protection against disclosure (Haffenberg v. Wendling, 271 App. Div. 1057, 69 N. Y. S. 2d 546; 8 Wigmore, Evidence [McNaughton rev. 1961] § 2212). Where disclosure is essential to ascertaining the truth the privilege must give way (Drake v. Herrman, 261 N. Y. 414, 418, 185 N.E. 685, 686). But, even then, appropriate procedures should be adopted to insure that unessential information is not unnecessarily disclosed, to the possible advantage of competitors.

In an ordinary judicial proceeding, disclosure *in camera* to the trial judge may be appropriate (cf. Kaumagraph Co. v. Stampagraph Co., Inc., 197 App. Div. 66, 73, 188 N. Y. S. 678, 683, aff'd 235 N. Y. 1, 138 N.E. 485). However, in this proceeding, where privately-selected arbi-

trators are serving as the tribunal, appellant is entitled, if it so chooses, to the additional protection of a referee appointed by the court, just as it would during pretrial discovery and inspection in an ordinary action (Haffenberg v. Wendling, 271 App. Div. 1057, 69 N. Y. S. 2d 546, supra; N. D. Q. Specialty Corp. v. Cypress Novelty Corp. 250 App. Div. 881, 295 N. Y. S. 218; Rules of Civil Practice, rule 142). The referee, working in co-operation either with the parties or with the arbitrators can insure that only essential data is disclosed, and then, if necessary, by means of verified extracts from appellant's records.

Accordingly, the order appealed from should be modified, on the law and in the exercise of discretion, to the extent of remanding the proceeding to Special Term to consider an application by appellant, if it is so advised, for the designation of a referee to supervise the production and inspection of documents described in the subpoena to the end that confidential data be not unnecessarily disclosed, and the order should otherwise be affirmed with costs to appellant.

Order entered on October 30, 1961 unanimously modified, on the law and in the exercise of discretion, to the extent of remanding the proceeding to Special Term to consider an application by appellant, if it is so advised, for the designation of a referee to supervise the production and inspection of documents described in the subpoena to the end that confidential data be not unnecessarily disclosed, and, as so modified, the order is affirmed, with $20 costs and disbursements to the appellant. All concur.

Appendix A

Order of the Court of Appeals of the State of New York, July 6, 1962

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Sixth day of July A.D. 1962.

Present, Hon. CHARLES S. DESMOND,
Chief Judge, Presiding

Mo. No. 479

In the Matter of the Arbitration Between

MINERALS AND CHEMICALS PHILIPP CORP.,
Respondent,

and

PANAMERICAN COMMODITIES, S.A.,
Respondent.

WORLD COMMERCE CORPORATION, S.A.,
Appellant,

vs.

MINERALS AND CHEMICALS PHILIPP CORP.,
Respondent.

A motion having heretofore been made upon the part of the respondent Minerals and Chemicals Philipp Corp. to dismiss the appeal taken by the appellant in the above

cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, with costs and ten dollars costs of motion, upon the ground that the order sought to be appealed from does not finally determine the proceeding within the meaning of the Constitution.

A copy

[SEAL]

GEARON KIMBALL
Deputy Clerk

Appendix A

Order of the Court of Appeals of the State of New York, September 27, 1962

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the twenty-seventh day of September A.D. 1962.

Present, Hon. CHARLES S. DESMOND,
Chief Judge, Presiding

Mo. No. 572

In the Matter of the Arbitration Between

MINERALS AND CHEMICALS PHILIPP CORP.,
Respondent,

and

PANAMERICAN COMMODITIES, S.A.,
Respondent.

WORLD COMMERCE CORPORATION, S.A.,
Appellant,

vs.

MINERALS AND CHEMICALS PHILIPP CORP.,
Respondent.

A motion having heretofore been made herein upon the part of the appellant to resettle the order of this Court dated July 6, 1962 and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied upon the ground that the order appealed from is not a final order in a separate special proceeding but an order made in the course of the arbitration proceeding (see, Civ. Prac. Act, §1459; *Matter of Morris & Cummings Dredging Company*, 209 N. Y. 588).

s/ GEARON KIMBALL
Deputy Clerk

FILED
Oct. 9, 1962
New York
County Clerk's Office

(SEAL OF STATE OF NEW YORK
COURT OF APPEALS)

Appendix A

Order of the Appellate Division, First Department of the Supreme Court of the State of New York

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 20th day of September, 1962.

Present—Hon. Bernard Botein, Presiding Justice
" Charles D. Breitel,
" Francis L. Valente,
" James B. M. McNally,
" Samuel W. Eager, Justices

In the Matter of the Arbitration between

Minerals and Chemicals Philipp Corp.,
Petitioner-Respondent,

and

Panamerican Commodities, S.A.,
Respondent.

World Commerce Corporation, S.A.,
Petitioner-Appellant,

against

Minerals and Chemicals Philipp Corp.,
Respondent-Respondent.

The above named petitioner-appellant having moved for leave to appeal to the Court of Appeals from the order of this Court, entered on February 27, 1962,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of James M. Ellis in support of said motion, and the affidavit of Anthony S. Genovese in opposition thereto, and after hearing Mr. James M. Ellis for the motion, and Mr. Anthony S. Genovese opposed,

It is hereby unanimously ordered that the said motion be and the same is hereby denied with $10 costs.

Enter:

VINCENT A. MASSI,
Clerk

APPENDIX B

New York Civil Practice Act

§406. Subpoena Issued by Judge, Arbitrator, Referee or Other Persons, in Certain Cases.

1. When a judge, or an arbitrator, referee or other person, or a board or committee, has been heretofore or is hereafter expressly authorized by law to hear, try or determine a matter, or to do any other act in an official capacity, in relation to which proof may be taken, or the attendance of a person as a witness may be required; or to require a person to attend, either before him or it, or before another judge, or officer, or a person designated in a commission issued by a court of another state or country, to give testimony, or to have his deposition taken, or to be examined; a subpoena may be issued by and under the hand of the judge, arbitrator, referee or other person, or the chairman or a majority of the board or committee, requiring the person to attend; and also, in a proper case, to bring with him a book or a paper. The subpoena must be served in the same manner as prescribed for the service of a subpoena issued out of court of record. This section does not apply to a matter arising, or an act to be done, in an action in a court of record.

2. A person who is duly subpoenaed, as prescribed in the last subdivision, must obey the subpoena. If he fails so to do, without a reasonable excuse, he is liable, in addition to any other punishment which may be lawfully inflicted therefor, for the damages sustained by the person aggrieved, in consequence of the failure, and fifty dollars in addition thereto, to be recovered in the same manner as prescribed in the case of a person failing to obey a subpoena issued out of a court of record. If he

fails to attend, the person issuing the subpoena, if he is a judge of a court of record or not of record, or if not, then any judge of such a court, upon proof by affidavit of the failure to attend, must issue a warrant to the sheriff of the county commending him to apprehend the defaulting witness and bring him before the officer, person or body before whom or which his attendance was required.

3. If the person subpoenaed and attending or brought as prescribed in the last subdivision before an officer or other person or body refuses without reasonable cause to be examined, or to answer a legal and pertinent question, or to produce a book or paper which he was directed to bring by the terms of the subpoena, or to subscribe his deposition after it has been correctly reduced to writing, the person issuing the subpoena, if he is a judge of a court of record, or not of record, may forthwith, or if he is not, then any judge of such court may upon proof by affidavit of the facts, by warrant commit the offender to jail, there to remain until he submits to do the act which he was required to do or is discharged according to law.

4. A warrant of commitment, issued as prescribed in the last subdivision, must specify particularly the cause of the commitment; and, if the witness is committed for refusing to answer a question, the question must be inserted in the warrant.

5. A warrant to apprehend or commit a person, issued as prescribed in this section, must be directed to the sheriff of the county where the person is, and must be

executed by him in the same manner as a similar mandate issued by a court in an action.

§1448. Validity of Arbitration Contracts or Submissions.

Except as otherwise prescribed in this section, two or more persons may submit to the arbitration of one or more arbitrators any controversy existing between them at the time of the submission, which may be the subject of an action, or they may contract to settle by arbitration a controversy thereafter arising between them and such submission or contract shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. A written submission or provision in a written contract between a labor organization, as defined in subdivision five of section seven hundred one of the labor law, and employer or employers or association or group of employers to settle by arbitration a controversy or controversies existing at the time of the submission or thereafter arising between the parties to the contract including but not restricted to controversies dealing with rates of pay, wages, hours of employment or other terms and conditions of employment of any employee or employees of such employer or employers shall likewise be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract, without regard to the justiciable character of such controversy or controversies.

Such submission or contract may include or be limited to questions arising out of valuations, appraisals or other controversies which may be collateral, incidental, prece-

dent, subsequent to or independent of any issue between the parties, without regard to the justiciable character of such questions or controversies.

A controversy cannot be arbitrated, either as prescribed in this article or otherwise, in either of the following cases:

1. Where one of the parties to the controversy is an infant, or a person incompetent to manage his affairs by reason of lunacy, idiocy or habitual drunkenness unless the appropriate court having jurisdiction approve a petition for permission to submit such controversy to arbitration made by the general guardian or guardian ad litem of the infant or by the committee of the incompetent.

2. Where the controversy arises respecting a claim to an estate in real property, in fee or for life.

But where a person capable of entering into a submission or contract has knowingly entered into the same with a person incapable of so doing, as prescribed in subdivision one of this section, the objection on the ground of incapacity can be taken only in behalf of the person so incapacitated.

Subdivision two of this section does not prevent the arbitration of a claim to an estate for years, or other interest for a term of years, or for one year or less, in real property; or of a controversy respecting the partition of real property between joint tenants or tenants in common; or of a controversy respecting the boundaries of lands or the admeasurement of dower.

§1456. Power of Arbitrators.

The arbitrators selected either as prescribed in this article or otherwise, or a majority of them, may require any person to attend before them as a witness; and they have, and each of them has, the same powers with respect to all the proceedings before them which are conferred upon a board or a member of a board authorized by law to hear testimony. All the arbitrators selected as prescribed in this article must meet together and hear all the allegations and proofs of the parties; but an award by a majority of them is valid unless the concurrence of all is expressly required in the submission or contract.

APPENDIX C

Affidavit in Support of Motion For Leave to Appeal to Court of Appeals

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

Index No. 3286—1961

In the Matter of the Arbitration Between

MINERALS AND CHEMICALS PHILIPP CORP.,
Petitioner-Respondent,

and

PANAMERICAN COMMODITIES, S.A.,
Respondent.

WORLD COMMERCE CORPORATION, S.A.,
Petitioner-Appellant,

vs.

MINERALS AND CHEMICALS PHILIPP CORP.,
Respondent-Respondent.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JAMES M. ELLIS, being duly sworn, deposes and says:

1. I am associated with the firm of Donovan Leisure Newton & Irvine, attorneys for the petitioner-appellant, World Commerce Corporation, S.A. (hereinafter referred to as "World Commerce"). I have been assigned to this

matter since its inception and am fully familiar with all of the prior proceedings herein. I make this affidavit in support of World Commerce's application for leave to appeal to the Court of Appeals from the order of this Court, filed February 27, 1962, modifying and affirming as modified the order of the Supreme Court, New York County, denying World Commerce's motion to quash the subpoena duces tecum directed to it herein, on the grounds that the appeal is required in the interests of substantial justice and to resolve the important Constitutional issues of first impression concerning the power of privately selected arbitrators to compel a non-party to the arbitration to publish valuable trade secrets to the arbitrating parties, both of whom are competitors of the witness.

2. Because of their relevance to matters appearing *infra*, I have annexed hereto as Exhibit "1" a copy of the order of the Supreme Court, New York County, denying World Commerce's motion to quash the subpoena duces tecum directed to it herein; as Exhibit "2" a copy of the order of this Court modifying and affirming as modified Special Term's order; as Exhibit "3" a copy of World Commerce's Brief on appeal to the Court of Appeals; and as Exhibit "4" a copy of World Commerce's "Motion To Resettle Order" now pending before the Court of Appeals.

3. This application is occasioned by an arbitration proceeding between respondent-respondent Minerals and Chemicals Philipp Corp. (hereinafter referred to as "Philipp") and respondent Panamerican Commodities, S.A., to which World Commerce has never been a party. At Philipp's instance, a preliminary arbitration hearing

attended only by the parties to the arbitration was scheduled for the sole purpose of obtaining the issuance of a subpoena duces tecum to World Commerce. During the course of that hearing, before any evidence whatever was presented to the arbitrators, the arbitrators issued a subpoena duces tecum requiring World Commerce as a non-party witness to produce certain records.

4. World Commerce moved in Special Term to quash the subpoena on the grounds that Philipp had offered no evidence of the relevance, materiality or necessity of any of the subpoenaed documents to any issue pending before the arbitrators, and that the very documents and items of information sought by the subpoena consisted of valuable trade secrets belonging to World Commerce that were entitled to protection. Special Term denied the motion upon the grounds that the unsworn argument of counsel before the arbitrators constituted satisfactory evidence of the relevance, materiality and necessity of the documents, and that the issue whether the documents constituted trade secrets was for the arbitrators to decide (Ex. "1").

5. World Commerce appealed to this Court, arguing that enforcement of the subpoena by Special Term on the basis of a record containing no evidence whatever, much less evidence of the relevance, materiality and necessity of any of the data sought by the subpoena, violated World Commerce's rights under the New York and United States Constitutions. This Court entered an order modifying Special Term's order "to the extent of remanding the proceeding to Special Term to consider an application by appellant, if it is so advised, for the designation of a referee to supervise the production and inspection of

documents described in the subpoena to the end that confidential data be not unnecessarily disclosed," and affirming Special Term's order as so modified (Ex. "2").

6. World Commerce attempted to appeal as of right to the Court of Appeals upon the grounds that this Court's order aggravated rather than cured the unconstitutional defects in Special Term's order, and that in addition this Court's unsolicited modification of Special Term's order by providing for the designation of a referee "to supervise the * * * *inspection* of documents" unlawfully extended the scope of World Commerce's duties under the subpoena (Ex. "3", pp. 12, 43-48), and unconstitutionally deprived World Commerce of its right to the "judicial determination" to which this Court had held World Commerce was entitled (Ex. "3", pp. 12, 38-42).

7. Philipp moved to dismiss the appeal upon the ground that this Court's order was not a final order, either because it did not terminate the arbitration proceeding proper, or in the alternative because it did not even terminate the independent special proceeding commenced by World Commerce's motion to quash (Ex. "4", par. 3 of Affidavit of James M. Ellis in Support of Motion To Resettle Order). The Court of Appeals entered an order granting without opinion the motion to dismiss, but did not specify which proceeding it held to be not finally terminated (Ex. "A" to Ex. "4").

8. World Commerce promptly moved in the Court of Appeals to resettle the order dismissing the appeal so as to make clear which proceeding that Court held to be before it and not finally determined (Ex. "4"). In reli-

ance upon advice given to me by the office of the Clerk of the Court of Appeals that such clarification of the order could be obtained only by formal motion therefor, and that such a motion could not be made returnable before September 24, 1962, we noticed our motion for hearing by the Court of Appeals on that date. Since the instant motion was required by statute to be served within thirty days after entry of the order of the Court of Appeals dismissing the appeal (C.P.A. §592(5)(b)(i)), and to be noticed for hearing at the next motion day in this Court (C.P.A. §592(2)), we are compelled to make this motion returnable on September 5, 1962, nearly three weeks before the Court of Appeals will have an opportunity to rule on the motion for resettlement now pending before it. Accordingly, I submit that this Court should take the instant motion under advisement and refrain from deciding it until after it has been advised of the views expressed by the Court of Appeals with respect to the motion to resettle. Clearly the importance of granting the instant motion at this time depends to some extent upon whether the Court of Appeals holds that the entire arbitration proceeding must be terminated before World Commerce can appeal as of right.

9. Whatever disposition the Court of Appeals may make of the motion to resettle, however, I submit that the instant motion for leave to appeal to the Court of Appeals should be granted. Far more important and complex Constitutional issues require decision here than in the case of *Drake* v. *Herrman*, 261 N. Y. 414 (1933), where this Court granted leave to appeal the Constitutionality of an order pursuant to a different statute granting pre-trial

discovery into the trade secrets owned by a *party* to an *action*. A mere glance at "The Issues Presented" on pages 11 and 12 of Exhibit "3" hereto will illustrate the number and variety of Constitutional problems raised by this Court's order, all of which are important questions of first impression on which no New York court has previously ruled, and all of which raise doubts as to the legality of fundamental aspects of the Arbitration Law, the rapidly growing importance of which requires no citation of authority before this Court. That the appeal which we seek leave to prosecute has a substantial Constitutional basis is borne out by pages 17 through 43 of Exhibit "3".

10. In addition, when this Court authorized inspection of the documents sought by the subpoena, it either ignored or reversed by implication a long line of prior cases, many of them decided in this very Department, explicitly holding that inspection cannot be compelled pursuant to a subpoena duces tecum in New York (Ex. "3", pp. 43-48). So radical a change in practice, extending far beyond the bounds of the Arbitration Law that was before this Court for construction, should not be effected without full consideration by the Court of Appeals. Particularly is this true because Philipp apparently disclaimed and waived any right or desire to inspect the documents (see p. 15, "Brief of Respondent Minerals & Chemicals Philipp Corporation" before this Court), and that issue consequently was not briefed before this Court.

WHEREFORE, your deponent prays for an order granting petitioner-appellant leave to appeal to the Court of Appeals from the order of the Appellate Division, First

Department, upon the ground that the appeal is required in the interests of substantial justice, and for the certificate of the Appellate Division, First Department, certifying that so much of its determination as affirmed the order of the Supreme Court, New York County denying petitioner-appellant's motion to quash the subpoena duces tecum directed to it herein was made on the law and not in the exercise of its discretion, and that so much of its determination as modified the order of the Supreme Court, New York County "to the extent of remanding the proceeding to Special Term to consider an application by appellant, if it is so advised, for the designation of a referee to supervise the production and inspection of documents described in the subpoena to the end that confidential data be not unnecessarily disclosed" was made in the exercise of its discretion, and that in its opinion the following questions of law are involved which ought to be reviewed by the Court of Appeals:

> "1. Did the Appellate Division abuse its discretion as a matter of law in authorizing pretrial discovery and inspection of such documents as a judicially designated referee might determine to fall properly within the scope of the subpoena duces tecum directed to petitioner-appellant World Commerce Corporation, S.A. herein?
>
> "2. Did the order of the Appellate Division affirming the order of Special Term denying petitioner-appellant World Commerce Corporation, S.A.'s motion to quash the subpoena duces tecum directed to it herein, contravene article I, sections 6, 11 and 12 of the Constitution of the State of New York?

"3. Did the order of the Appellate Division affirming the order of Special Term denying petitioner-appellant World Commerce Corporation, S.A.'s motion to quash the subpoena duces tecum directed to it herein, contravene the Fourth and Fourteenth Amendments to the Constitution of the United States?"

s/ JAMES M. ELLIS

James M. Ellis

Subscribed and sworn to before me this
2nd day of August, 1962

s/ DIANA BEDDOE
Notary Public

Diana Beddoe
Notary Public, State of New York
No. 31—0217150
Qualified in New York County
Commission Expires March 30, 1963

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 674.

WORLD COMMERCE CORPORATION, S.A.,

Petitioner,

v.

MINERALS AND CHEMICALS PHILIPP CORP.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

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OCTOBER TERM, 1962

No. 674.

WORLD COMMERCE CORPORATION, S. A.,
Petitioner,

v.

MINERALS AND CHEMICALS PHILIPP CORP.,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

CITATIONS TO OPINIONS BELOW

The order of Special Term, New York County, Supreme Court of the State of New York (hereinafter "Special Term"), entered October 30, 1961, denying World Commerce's motion to quash a subpoena *duces tecum* issued by the arbitrators is not reported. It is printed in the record (13-50).[1]

The order of the Supreme Court of the State of New York, Appellate Division, First Department (hereinafter "Appellate Division"), entered on February 27, 1962, modifying and affirming the order of Special Term, is not reported. It is printed in the record (442-444).

The opinion of the Appellate Division, First Department, on the order entered on February 27, 1962 upon

[1] References are to folios in the printed "Papers on Appeal From Order" in the Court of Appeals of the State of New York, filed in this Court by Petitioner.

which review is sought, is reported at 15 A. D. 2d 432, 224 N. Y. Supp. 2d 763 and is printed in the record (445-456).

The order of July 6, 1962 of the Court of Appeals of the State of New York (hereinafter "Court of Appeals"), dismissing World Commerce's appeal to that Court is reported at 11 N. Y. 2d 1109, 184 N. E. 2d 319 and is printed in the Petition, Appendix A, pp. A7-A8.

The Appellate Division's order of September 20, 1962 denying World Commerce's motion for leave to appeal to the Court of Appeals is reported at 15 A. D. 2d 885, and is printed in the Petition, Appendix A. pp. A11-A12.

The Court of Appeals' order of September 27, 1962 denying World Commerce's motion to resettle the order of the Court of Appeals of July 6, 1962 is reported at 12 N. Y. 2d 672, and is printed in the Petition, Appendix A, pp. A9-A10.

QUESTIONS PRESENTED

1. Whether a State Court order affirming an order denying a motion to quash a subpoena *duces tecum*, and remanding the cause to the lower court for further judicial proceedings is a final order within the jurisdiction of this Court.

2. Whether World Commerce has raised a substantial Federal question under the Fourth and Fourteenth Amendments to the United States Constitution where

(a) It concedes that the documents called for by a subpoena *duces tecum* are limited and particularly described.

(b) The relevance of the documents subpoenaed was fully demonstrated before the arbitrators prior to its issuance and before the New York courts in proceedings brought to quash the subpoena, and

(c) World Commerce has been afforded the right to a judicial determination with respect to the confidential nature of the documents but has declined to exercise this right.

STATEMENT OF THE CASE

Petitioner, World Commerce Corporation, S. A., a Panamanian corporation, seeks review of an order of the Appellate Division, entered on February 27, 1962 (442-444), affirming and modifying Special Term's denial of its motion to quash a subpoena *duces tecum* issued by the arbitrators in an arbitration proceeding between respondent, Minerals & Chemicals Philipp Corporation and Panamerican Commodities, S. A. (the parties hereinafter are referred to as "World Commerce", "Philipp" and "Panamerican", respectively.)

The Arbitration

The arbitration proceeding was instituted on November 20, 1959 by Philipp to recover substantial damages from Panamerican for breach of a contract wherein Philipp was appointed exclusive agent for the sale of Acari ore mined by Panamerican in Peru (3, 83, 84). Under the provisions of the agency contract six months notice of termination was required (135).

Prior to the execution of the agency contract on January 9, 1959 and until June 11, 1959, Philipp conducted extensive negotiations with the major iron ore consumers in the United States in an effort to generate interest in and create a market for Acari ore (248, 249). As a result of its negotiations Philipp made an initial sale to Armco Steel Corporation and made firm offers to other major steel

producers (249). Philipp advised Panamerican of these offers on June 5, 1959. On June 11, 1959, Panamerican terminated the agency contract, without notice, by instructing Philipp to make no further offers and withdraw those previously made (249, 250). Panamerican thereafter disposed of its entire output to Ore Marketing Corporation (Ore Marketing) pursuant to a contract negotiated prior to June 11, 1959 and executed shortly thereafter (251, 252). Ore Marketing, in turn, disposed of the ore to World Commerce, its affiliate, which then sold the ore to consumers in the United States with whom Philipp had been actively negotiating (107, 108, 131-147, 251-254).

On December 30, 1960, in contemplation of presenting its proof before the arbitrators, Philipp requested World Commerce to make available to it certain information regarding sales of Acari ore (64-69). World Commerce refused to make such information available (74, 75).

On February 27, 1961, having failed to obtain the information requested of World Commerce voluntarily, Philipp moved at Special Term for an order to examine World Commerce before trial. Philipp's motion was denied on the ground that process in an arbitration proceeding should issue from the arbitrators "absent extraordinary circumstances" (421-426). Special Term's decision was affirmed without opinion by the Appellate Division, First Department on May 24, 1961 (29).

At the initial arbitration hearing on September 29, 1961, Philipp requested the arbitrators to issue a subpoena *duces tecum* to World Commerce requiring it to produce certain documents bearing upon the quantity of Acari ore sold by it, the purchasers of such ore and the terms of sale (153-156). At the outset the arbitrators required that Philipp demonstrate the relevancy of the documents to be subpoenaed (121). Thereupon counsel demonstrated that

Philipp intended to use the information sought in proving that there was a ready market for Acari ore; that such ore was sold to customers whom Philipp initially solicited; and the damages sustained by Philipp as a result of the breach of the agency agreement (155, 156). After extensive argument by counsel for Philipp and counsel for Panamerican with respect to the relevancy of the documents sought, the arbitrators unanimously ruled that the instant subpoena would be issued to World Commerce (216).

Judicial Review of the Subpoena

When served with the subpoena *duces tecum*, World Commerce moved to quash it before Special Term on the ground that the documents sought were confidential and not relevant to the issues before the arbitrators (36-39). After reviewing the record of the arbitration proceeding, Special Term denied World Commerce's motion by order of October 30, 1961, stating:

> "The minutes of the hearing before the arbitrators disclose that the production of the books and records are material and necessary. Whether the material is confidential is a matter for determination by the arbitrators, who will make their decision after examining the records" (15).

World Commerce appealed Special Term's order to the Appellate Division (7-12). The Appellate Division held the documents subpoenaed were clearly relevant both on the issue of the breach of the agency contract and on damages (453). However, it modified the order appealed from and remanded the proceeding to Special Term to "consider an application by appellant (World Commerce), if it is so advised, for the designation of a referee to super-

vise the production and inspection of documents described in the subpoena to the end that confidential data be not unnecessarily disclosed,'' ... (444). As so modified, Special Term's order was affirmed (444).

On April 27, 1962 World Commerce served notice that it would appeal to the Court of Appeals from the Appellate Division's order (7-12). Upon motion by Philipp, the Court of Appeals, by order of July 6, 1962, dismissed World Commerce's appeal upon the ground that the order sought to be appealed from was not final within the meaning of the Constitution of the State of New York. (Petition, Appendix A, pp. A7, A8.) Subsequently, the Court of Appeals denied World Commerce's motion to resettle the order dismissing its appeal

> ''Upon the ground that the order appealed from is not a final order in a separate proceeding, but an order made in the course of the arbitration proceeding (See, Civ. Prac. Act, §1459; *Matter of Morris & Cummings Dredging Company*, 209 N. Y. 588.)'' (Petition Appendix A, pp. A9, A10)

Thereafter, on September 20, 1962, World Commerce's motion for leave to appeal to the Court of Appeals was denied by the Appellate Division. (Petition, Appendix A, pp. A11, A12.)

ARGUMENT

The Order Below is not Final

Title 28 U.S.C. §1257 provides that this Court may review only ''final judgments or decrees'' of a state court. An order upon which review is sought: (1) must be final as an effective determination of the litigation and not of

merely interlocutory or intermediate steps therein; and (2) it must be subject to no further review or correction in any other state tribunal. *Market Street Ry. Co.* v. *Railroad Commission*, 324 U. S. 548, 551 (1948). The order sought to be reviewed herein is not final in either respect.

The Appellate Division's order requires World Commerce, a witness to the arbitration proceeding, to produce certain documents pursuant to a subpoena *duces tecum*. Under the law of New York such an order is deemed auxiliary and administrative to an action or proceeding since it is designed to facilitate the disposition of the "merits although it does not adjudicate any issue on the merits either as to the parties or as to strangers." *Matter of Morris & Cummings Dredging Co.*, 209 N. Y. 588 (1913); *Matter of Attorney General*, 155 N. Y. 441 (1898); See *Cohen & Karger, Powers of the New York Court of Appeals*, rev. ed. at pp. 203, 206. Although the decision of the Court of Appeals designating the Appellate Division's order as non-final is not controlling, this Court regards it as both pertinent and persuasive. *Konisberg* v. *State Bar of California*, 366 U. S. 36 (1961); *Gospel Army* v. *Los Angeles*, 331 U. S. 543 (1947). Moreover, the decisions of the New York courts on this aspect of finality are in full accord with those of this Court.

Cobbledick v. *United States*, 309 U. S. 324 (1940) is decisive. There this Court held non-final an order denying a motion to quash subpoenas *duces tecum* directed to witnesses. Mr. Justice Frankfurter stated:

> "... The requirement of finality will be enforced not only against a party to the litigation but against the witness who is a stranger to the main proceeding. Neither a party nor a non-party witness will be allowed to take to the upper court a ruling where the result of review will be 'to halt in the orderly

progress of a cause and consider incidentally a question which has happened to cross the path of such litigation.' Segurola *v.* United States, 275 U. S. 106, 112, 72 L ed. 186, 189, 48 S Ct. 77. This is so despite the fact that a witness who as a stranger to the litigation could not be party to an appeal taken at the conclusion of the main cause" (p. 326).

Similarly, in *Alexander* v. *United States*, 201 U. S. 117 (1906), this Court dismissed an appeal from an order requiring witnesses to appear and produce documents before an examiner. Mr. Justice McKenna stated the basis for the Court's ruling:

> "In a certain sense finality can be asserted of the orders under review; so, in a certain sense, finality can be asserted of any order of a court. And such order may coerce a witness, leaving to him no alternative but to obey or be punished. It may have the effect and the same characteristic of finality as the orders under review, but from such a ruling it will not be contended there is appeal. Let the Court go farther and punish the witness for contempt of its order,—then arrives a right of review; and this is adequate for his protection without unduly impeding the progress of the case . . . Prior to that the proceedings are interlocutory in the original suit" (pp. 121, 122).

A further aspect of the non-finality of the Appellate Division's order is derived from the right given World Commerce to apply for the appointment of a referee to supervise the production of its documents. This Court has established as a fundamental precept of finality that an order or judgment contemplating further discretionary action on remand is not final. *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62 (1948); *Grays Harbor Logging Co.* v. *Coats-Fordney Co.*, 243 U. S. 251 (1917); *Beebe* v.

Russell, 19 How. 283 (1857). Here, the remand affords World Commerce the right to receive a judicial determination as to the confidential nature of the documents subpoenaed. Clearly such review is not ministerial but discretionary in nature for it provides to World Commerce the protection it claims to be seeking herein.

The principle of finality as a condition of review is salutary. It forbids piecemeal disposition by appeal of what for practical purposes is a single controversy. It prevents the obstruction of just claims that would arise from permitting the harassment and costs of a succession of separate appeals from the rulings that arise in various stages of a proceeding. This principle is particularly applicable in arbitration where the parties seek and are entitled to an economical and expeditious settlement of a controversy.

No Federal Question is Presented

A. Enforcement of the Order Will Not Constitute a "Search and Seizure"

World Commerce attempts to raise a substantial Federal question by contending that the enforcement of the subpoena as directed by the New York courts violates its rights secured by the Fourth Amendment. This contention is patently without merit. In *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186 (1946), this Court clearly defined the constitutional limitations inherent in the issuance and enforcement of a subpoena *duces tecum*. In affirming certain orders requiring compliance with subpoenas *duces tecum*, Mr. Justice Rutledge disposed of the Fourth Amendment argument by stating:

> "The short answer to the Fourth Amendment objections is that the records in these cases present

> no question of actual search and seizure, but raise only the question whether orders of court for the production of specified records have been validly made; and no sufficient showing appears to justify setting them aside. No officer or other person has sought to enter petitioners' premises against their will, to search them, or to seize or examine their books, records or papers without their assent, otherwise than pursuant to orders of court authorized by law and made after adequate opportunity to present objections, which in fact were made. Nor has any objection been taken to the breadth of the subpoenaes or to any other specific defect which would invalidate them" (p. 195).

Here, as in *Oklahoma Press Pub. Co.*, World Commerce is compelled to produce its documents pursuant to valid court order only after it was afforded the opportunity to object which, in fact, it did. Moreover, no objection has been made with respect to the breadth of the subpoena and, in fact, World Commerce concedes that the documents sought are limited and particularly described. World Commerce seeks to raise a substantial Federal question under the Fourth Amendment upon the sole basis that the subpoena was issued and enforced "without any evidence of relevance." (Petition, p. 15.) In this regard World Commerce's reliance upon *Hale* v. *Henkel*, 201 U. S. 43 (1906), to support its argument is misplaced.

In *Hale*, this Court in passing upon the validity of a subpoena *duces tecum* issued to a witness and enforced by the courts stated:

> "Doubtless many, if not all, of these documents may ultimately be required, but some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with other companies implicated, or some

evidence of their materiality produced, to justify an order for the production of such a mass of papers" (p. 77).

Here, it is manifest that "some evidence of the materiality" of the documents subpoenaed was produced. As stated above, prior to the issuance of the subpoena at the initial arbitration proceeding, the arbitrators required and received a particularized statement as to the relevancy of the documents sought (121). In opposition to the motion to quash the subpoena, detailed affidavits were submitted to the Court on the issue of relevancy (79, 103). As stated in the opinion of the Appellate Division affirming the denial of the motion to quash the subpoena, "Minerals Corp., (Philipp) at the hearing before the arbitrators and in its papers in opposition to the motion, sufficiently developed the relevancy of the class of documents sought and the near impossibility of obtaining the information by other means. . . . Their relevancy to both the alleged breach and any damages is therefore clear" (452, 453). Plainly petitioner's contention that Philipp has failed to "demonstrate relevance" is specious and, accordingly, a substantial Federal question has not been raised under the Fourth Amendment.

B. World Commerce Has Not Been Denied Due Process

World Commerce attempts to raise a substantial Federal question under the due process clause of the Fourteenth Amendment by asserting: (1) that compliance with the subpoena will deprive it of "valuable property", and (2) that the taking of such property will be effected without judicial hearing. This argument fails in the first instance since World Commerce has not established that its docu-

ments are "valuable property" requiring the protection sought.

World Commerce asserts, and respondent concedes, that no judicial determination has been made as to the confidential nature of the documents. Indeed, none could be made since World Commerce has elected not to submit the disputed documents to the courts. The Appellate Division has ruled, however, that World Commerce is entitled to a determination as to the confidential nature of the documents and has afforded World Commerce the right to have a referee appointed for that purpose. Such a right cannot be said to be "illusory" since the courts of New York have discretionary authority over the conduct of a referee in the disposition of causes submitted to him. *Lecky* v. *Winston*, 186 App. Div. 642 (3rd Dept., 1919); *Matter of Ebbets*, 155 Misc, 860 (Surr. Ct., Kings Co. 1935).

Assuming for the purpose of argument that the documents subpoenaed contain confidential information, it is well established that the qualified privilege which attaches to such information must yield where the information is relevant and cannot otherwise be obtained. *Drake* v. *Herrman*, 261 N. Y. 414 (1933). Here, Philipp has amply demonstrated the relevancy of the documents and has further demonstrated the impossibility of obtaining the information sought through other means. Thus, it is clear that World Commerce has raised only a formal constitutional issue not rising to the dignity of a substantial Federal question.

The constitutional arguments raised by World Commerce in attacking the instant subpoena would apply equally to every corporate witness called upon to produce documents. Were it impossible for a party to compel one possessed of relevant information to produce such information, the effectuation of a litigants' rights would prove

impossible. Compulsory measures for the production of evidence are essential to the very existence of a court of justice in any civilized community." *Matter of Makames*, 238 App. Div. 534, 536 (4th Dept., 1933).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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